STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
Griffin, P.J., and Meter and Kelly, J.J.

SHARDA GARG,

Plaintiff-Appellee,

v

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, A GOVERNMENTAL AGENCY OF MACOMB COUNTY,

Defendant-Appellant.

---/

Supreme Court No. 121361

Court of Appeals No. 223829

Macomb County Circuit Court
No. 95-3319-CK

AMICUS CURIAE BRIEF OF
MICHIGAN ATTORNEY GENERAL

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Patrick J. O'Brien (P27306)
Heather S. Meingast (P55439)
Assistant Attorneys General
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

Dated: July 16, 2004

TABLE OF CONTENTS

TABLE OF CONTENTS, Cont'd.

INDEX OF AUTHORITIES

Page

Cases

INDEX OF AUTHORITIES, Cont'd.

Statutes

Other Authorities

INDEX OF AUTHORITIES, Cont'd.

QUESTIONS PRESENTED FOR REVIEW

I. **Whether the "continuing violations" doctrine as adopted in *Sumner v The Goodyear Tire & Rubber Co*, should be abrogated or at least modified in light of the United States Supreme Court's decision in *Amtrak v Morgan*, and the statute of limitation set forth in MCL 600.5805(1).**

II. **Whether under any test used for determining what constitutes protected activity for purposes of establishing a retaliation claim under the CRA, physical retaliation by a non-victim plaintiff should not be considered protected activity.**

STATEMENT OF PROCEEDINGS AND FACTS

Amicus Curiae adopt the Statement of Facts presented in Defendant-Appellant Macomb County Community Mental Health's Brief on Appeal.

STANDARD OF REVIEW

Amicus Curiae adopts the Standard of Review as set forth in Defendant-Appellant Macomb County Community Mental Health's Brief on Appeal.

ARGUMENT

INTRODUCTION

The State of Michigan, as an employer of thousands of Michigan citizens through its agencies, and as a party in numerous suits brought under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*, has a significant interest in two issues presented by this appeal.

First, amicus curiae will address this Court's question regarding "whether plaintiff established a prima facie case regarding either of her two theories of retaliation." There is a significant question presented in this case regarding whether plaintiff engaged in protected activity sufficient to establish a retaliation claim under the CRA. Plaintiff claims that she was retaliated against for opposing the sexual harassment of her coworkers. Plaintiff alleges that she engaged in protected activity and opposed sexual harassment when she struck the supervisor who had allegedly harassed the coworkers. The Court of Appeals agreed that this was protected activity under the CRA. The Court of Appeals' decision is based on case law suggesting that a plaintiff need only "raise the spectre" of discrimination to prove that she opposed a violation of the CRA. However, this decision is inconsistent with other decisions addressing what constitutes protected opposition activity under this language. Moreover, to the extent that it suggests physical retaliation is a protected activity, it is unsupported by Michigan or federal law interpreting the CRA or its federal counterpart, Title VII, and sets an unacceptable precedent that must be reversed.

Second, amicus curiae will address this Court's third question: "whether the continuing violations doctrine of *Sumner v Goodyear Tire & Rubber Co,* 427 Mich 505 (1986), should be preserved, modified or abrogated in light of the language of the statute of limitations, MCL 600.5805(1), and the United States Supreme Court's decision in *Nat'l Rail Passenger Corp (Amtrak) v Morgan,* 536 US 101 (2002) . . . ." Again, as an employer of thousands, the State of

Michigan has a significant interest in whether the "continuing violations" doctrine should remain a viable theory in Michigan. The continuing violations doctrine allows plaintiffs to reach back in time and assert claims and seek damages based on acts that would otherwise be barred as untimely. Thus, alleged acts that took place years ago, possibly under different supervisors and witnessed by coworkers who have long since moved on, become the basis for present-day lawsuits that are often complicated and fact-intensive. Moreover, the doctrine is not a model of clarity, and thus is not applied consistently by the courts. Abrogating the doctrine will provide defendant employers and plaintiff employees with a precise limitations period, leaving no doubt as to what acts may form the basis for recovery.

For these reasons, this Court should: (1) announce a more rigorous test for determining when a plaintiff has engaged in protected opposition activity for purposes of establishing a prima facie retaliation claim under the CRA, and further hold that physical retaliation is not protected activity under the CRA; and (2) abrogate the application of the continuing violates doctrine in cases alleging discrimination based on discrete acts, as well as cases alleging hostile work environment.

I. Under any test used for determining what constitutes protected activity for purposes of establishing a retaliation claim under the CRA, physical retaliation by a non-victim plaintiff should not be considered protected activity.

Here, the Court of Appeals concluded that reasonable jurors could differ with regard to whether Plaintiff sufficiently established the elements of a retaliation claim regarding her alleged opposition to sexual harassment. Plaintiff's theory in this case was that she engaged in protected activity by opposing the sexual harassment of her coworkers by striking her supervisor. The Court of Appeals determined, "[i]ndeed, reasonable jurors could conclude that plaintiff, by slugging Habkirk, sufficiently 'raise[d] the specter' that she opposed a violation of the civil rights act. *Mitan v Neiman Marcus*, 240 Mich App 679, 682; 613 NW2d 415 (2000); see also

McLemore v Detroit Receiving Hosp & Univ Medical Center, 196 Mich App 391, 396; 493 NW2d 441 (1992)." In this case, the Court of Appeals took the "raising the spectre" standard out of context and out of line with other Michigan and federal decisions addressing what constitutes protected activity for purposes of establishing a retaliation claim. Not only is the decision unsupported by law, it suggests that plaintiffs may engage in physical violence as a form of opposition to discrimination. This Court must clarify that such behavior does not qualify as a protected activity under the CRA.

A. The elements of a retaliation claim under the CRA.

Section 701 of the CRA provides, in part, that a person shall not:

> (a) Retaliate or discriminate against a person because the person has *opposed a violation of this act*, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701 (emphasis added).]

To establish a prima facie case of unlawful retaliation under § 701, a plaintiff must prove that she:

> (1) [ ] *engaged in a protected activity*; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Polk v Yellow Freight System, Inc*, 876 F.2d 527, 531 (CA 6, 1989); see also *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F.2d 1304, 1310 (CA 6, 1989); *Kroll v Disney Store, Inc*, 899 F Supp 344, 348 (ED Mich, 1995). [*DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436 (1997) (emphasis added).]

See also, *Pena v Ingham Co Rd Comm'n*, 255 Mich App 299, 311; 660 NW2d 351 (2003); *Meyer v Center Line,* 242 Mich App 560, 568-569; 619 NW2d 182 (2000); *Barrett v Kirtland Community College,* 245 Mich App 306, 325; 628 NW2d 63 (2001).

As recently explained by a Michigan federal court[1], *Comiskey v AIAG,* 40 F Supp 2d 877, 897-898 (ED Mich, 1999):

> Both Title VII and the Michigan Elliott-Larsen Civil Rights Act prohibit retaliatory conduct by an employer in two situations: (1) when an employee has made a charge of discrimination, filed a complaint of discrimination, or otherwise participated in enforcement proceedings ("the participation clause"); or (2) when an employee "has opposed a violation [of the Act]" the "opposition clause"). *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989). As the Sixth Circuit observed in *Booker*, "The distinction between employee activities protected by the participation clause and those protected by the opposition clause is significant because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings." *Id.* The "exceptionally broad protection" of the participation clause extends to persons who have "participated in any manner" in Title VII proceedings. *Id.* On the other hand, "the opposition clause" does not protect all "opposition" activity. In opposition cases, courts are required "to balance the purpose of the Act to protect persons engaging reasonably in activities opposing discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Id.* (citations omitted). Thus, as the *Booker* court noted,
>
> > There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered. . . . Thus, an employee is not protected when he violates legitimate rules and orders of his employer, disrupts the employment environment, or interferes with the attainment of his employer's goals.
>
> 879 F2d at 1312 (citations omitted).
>
> * * *
>
> In order to engage in a protected opposition activity under Title VII or Elliott-Larsen, a plaintiff must make an overt stand against suspected illegal discriminatory action. *Booker v Brown* and *Williamson, supra*. "[A] vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice. An employee may not invoke the protections of the Act by making a vague charge of discrimination." 879 F.2d at 1313.

---

[1] This Court often reviews federal court decisions interpreting Title VII when interpreting analogous provisions in the CRA. See *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993); *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000).

In this case, because Plaintiff did not allege with respect to this claim that she made a charge or filed a complaint regarding sexual harassment, she was required to show that she engaged in activity "opposing a violation" of the CRA.

B. **Alleging "opposition" to a violation of the CRA under Michigan law.**

There are few published decisions in Michigan substantively addressing what constitutes protected activity for purposes of establishing a retaliation claim under the CRA. Notably, this Court has not addressed the issue. Accordingly, the instant appeal presents an important opportunity to clarify what qualifies as activity opposing a violation of the CRA.

The "raising the spectre" language quoted by the Court of Appeals in this case appeared in *McLemore, supra*, 196 Mich App 391, lv den 443 Mich 878 (1993). There, the Court of Appeals reviewed a jury verdict finding that the defendant unlawfully discharged the plaintiff in retaliation for her filing of a sex discrimination charge with the Equal Employment Opportunity Commission. The defendant had hired the African-American female plaintiff as a clinical instructor at the hospital's school of radiologic technology. In 1982 and 1983, plaintiff's performance was evaluated as "effective." Thereafter, the plaintiff applied for a vacant coordinator's position. Although the defendant interviewed the plaintiff for the job, the defendant instead hired a male for the position. The plaintiff filed a written complaint with the hospital "expressing her concern that the hiring decision may have been the result of 'bias,' and requesting an explanation for the decision in order to avoid 'litigation.'" *Id.* at 394. She was told that the male was selected based upon "superior qualifications." *Id.* In response to her complaint, the plaintiff's work performance was also criticized. Shortly thereafter, the man resigned, and the plaintiff reapplied for the position. *Id.* The defendant hospital again hired a male, who subsequently criticized the plaintiff's performance, calling it "unsatisfactory." *Id.* A

short time later, the plaintiff filed a charge with the EEOC alleging sex discrimination. *Id.* Later, when the hospital experienced financial trouble, it eliminated the plaintiff's position and terminated her. *Id.* The plaintiff filed suit under the CRA alleging that the defendant discharged her in retaliation for expressing her concern of sex discrimination to the defendant and for filing her sex discrimination charge with the EEOC. *Id.*

On appeal, the defendant claimed there was insufficient evidence to support the plaintiff's retaliation claim because there was no evidence that the decision to eliminate plaintiff's position was motivated by anything other than economic considerations. "[Defendant] argue[s] that because plaintiff did not file her charge with the EEOC until April 2, 1984, what went on before that date cannot support her claim for retaliation." *Id.* at 395. The Court of Appeals commented:

> The Civil Rights Act . . . prohibits employers from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act. MCL 37.2701; [ ]. In *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312-1314 (CA 6, 1989)[2],

---

[2] In *Booker*, *supra*, the African American male plaintiff brought a retaliation claim under the CRA alleging that he was retaliated against for opposing race discrimination. The plaintiff's alleged protected activity was the writing of a letter to the human resources department asserting that the reports of his mismanagement was "a case of ethnocism, which should be investigated immediately." *Booker*, *supra*, 879 F2d at 1309 (internal citation omitted). With regard to whether the letter constituted protected "opposition" activity, the court concluded:

> The only other possible suggestion of opposition is when Booker alleges that the charges against him are a result of "ethnocism." Assuming that Booker intended discrimination, we hold that a vague charge of discrimination in an internal letter or memorandum is insufficient to constitute opposition to an unlawful employment practice. An employee may not invoke the protections of the Act by making a vague charge of discrimination. Otherwise, every adverse employment decision by an employer would be subject to challenge under either state or federal civil rights legislation simply by an employee inserting a charge of discrimination. In our view, such would constitute an intolerable intrusion into the workplace. Thus, since Booker's letter of August 26, 1985, does not fall under either the participation or opposition clauses, he has failed to state a cause of action. [*Id.* at 1313-1314.]

> the federal court of appeals decided that the Civil Rights Act did not protect from retaliation an employee who had merely expressed concern to his employer about possible discrimination. We strongly disagree with this interpretation of the act. *Regardless of the vagueness of the charge or the lack of formal invocation of the protection of the act, if an employer's decision to terminate or otherwise adversely affect an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs.* We will not interpret the act to allow employers to peremptorily retaliate against employees with impunity. Doing so would be contrary to our state's policy of protecting employees who are about to report a suspected violation of law. See MCL 15.362; [ ]. [*Id.* at 395-396 (emphasis added).][3]

The court noted that the core issue was the defendant's motivation for eliminating the plaintiff's job, and that while the plaintiff did not dispute that the hospital needed to eliminate jobs, she contended that her job was eliminated because of her complaints. *Id.* at 396. For the court, in the absence of direct evidence, the question was whether the plaintiff provided sufficient circumstantial evidence demonstrating that the defendants were motivated by a desire to retaliate:

> Plaintiff presented evidence that defendants, who previously judged her job performance as effective, suddenly viewed it as unsatisfactory after she raised the issue of bias. In fact, the barrage of criticism of plaintiff's job performance actually began as defendants' official response to plaintiff's internal complaint. This supports the inference that it was the internal complaint with its implied threat of a formal discrimination complaint and not-so-implied threat of litigation that caused the sudden change in how defendants viewed plaintiff's worth.
>
> Defendants point out that neither in the internal complaint nor in the meeting that followed did plaintiff expressly discuss sex discrimination. *While this is relevant, we believe a rational trier of fact could still conclude that defendants' reaction to the complaint was motivated by a fear that plaintiff, a black female, would eventually file a complaint charging some type of prohibited bias, either race or sex discrimination.* [*Id.* at 396-398.]

Thus, the Court of Appeals concluded that the evidence, viewed in a light most favorable to the plaintiff, supported the inference that she was laid off in retaliation for charging the defendants

---

Booker v Brown & Williamson Tobacco Co., 879 F2d 1304, 1314 (6th Cir., 1989)

with sex discrimination. *Id.* at 398.

The facts in *McLemore* reveal that the plaintiff made an internal written complaint to the hospital in which she expressed concern regarding "bias" in the hiring decision, and wanted an explanation in order to avoid "litigation," but did not specifically mention the CRA or use the words "sex discrimination." Thus, the *McLemore* Court's reference to "raising the spectre" of discrimination was made in the context of refuting the argument that a plaintiff must cite or invoke the CRA or use specific words like "sex discrimination" in order to have opposed a violation of the act, *where the plaintiff made a written complaint alleging "bias" and threatening "litigation."* The *McLemore* Court essentially concluded that the defendant employer could have discerned from the facts and the language of the complaint that the plaintiff was threatening a claim of sex or race discrimination.

The *McLemore* Court's decision was noted in *Cremonte v Michigan State Police*, 232 Mich App 240; 591 NW2d 261 (1998), where a white male police officer alleged he was retaliated against for opposing affirmative action in hiring within the department. Although the issue of whether the plaintiff officer had established a prima facie case of retaliation was not preserved for appellate review, the Court of Appeals noted:

> The Civil Rights Act protects those who seek redress for civil rights violations. Pursuant to the act, an employer may not "retaliate or discriminate against a person because the person has opposed a violation of this act." MCL 37.2701 (a)[ ]. In reviewing the record, we found no evidence that plaintiff "opposed a violation" of the Civil Rights Act. Plaintiff's writings to his superiors did not raise the specter of a discrimination complaint, nor did they contain any hint of any illegality on the part of defendant. Indeed, the writings can, at best, be interpreted as plaintiff's expression of disagreement with defendant's employment practices. We do not believe that the protections of the Civil Rights Act extend to such statements. Compare *McLemore v Detroit Receiving Hosp,* 196 Mich. App. 391, 396; 493 N.W.2d 441 (1992). See also *Booker v Brown & Williamson Tobacco Co, Inc,* 879 F.2d 1304, 1311-1314 (CA 6, 1989). [*Id.* at 245 n4.]

---

[3] The *McLemore* Court's use of the term "spectre" is unfortunate because of its suggestion that barely perceptible claims of opposition activity are sufficient.

The *McLemore* decision was addressed more fully in *Mitan v Neiman Marcus*, 240 Mich App 679; 613 NW2d 415 (2000). In *Mitan*, the plaintiff alleged retaliatory discharge under MCL 37.1602(a) of the Michigan Handicappers' Civil Rights Act. On appeal from a grant of summary disposition in favor of the defendant, the Court of Appeals observed that this section is identical to § 701 of the CRA, and thus found CRA decisions persuasive:

> In discussing the antiretaliation provision of the Civil Rights Act, this Court stated in *McLemore v Detroit Receiving Hosp & Univ Medical Ctr*, 196 Mich App 391, 396; 493 NW2d 441 (1992), that regardless of the vagueness of the charge or the lack of formal invocation of the protection of the [Civil Rights Act], if an employer's decision to terminate or otherwise adversely effect [sic] an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs.
>
> Because the HCRA has the same purposes and goals as the Civil Rights Act, MCL 37.2101 *et seq.*; [ ]; *Milnikel v Mercy-Memorial Medical Ctr, Inc*, 183 Mich App 221, 223-224; 454 NW2d 132 (1989), we conclude that the reasoning set forth in *DeFlaviis* and *McLemore* with respect to the retaliation provision of the Civil Rights Act applies with equal force to the retaliation provision of the HCRA.
>
> Here, the evidence showed that plaintiff sent a *written complaint* to the human resources manager indicating that Jill Blake, her supervisor, had engaged in *"job discrimination"* because she would not allow plaintiff to participate in a sales promotion. *While plaintiff's complaint mentioned that she accomplished numerous sales "during limited hours due to my physical disability," she did not suggest or imply that the alleged job discrimination was related to her disability.* She sent a second *written complaint* indicating that Blake had engaged in *"job harassment"* because she had disputed whether sales plaintiff had made could be credited toward her total sales for another promotion and had called plaintiff a liar. *However, because plaintiff's complaints did not state, imply, or raise the specter that plaintiff either opposed a violation of the HCRA or "made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing" under the act,* this evidence does not establish that plaintiff participated in a protected activity. [*Id.* at 681-682 (emphasis added).]

Accordingly, the Court of Appeals affirmed the dismissal of the plaintiff's retaliation claim. See also *Bachman v Swan Harbour Ass'n*, 252 Mich App 400, 436; 653 NW2d 415 (2002) (holding that plaintiff's requests for signs, paint, snow removal, and construction of a patio ramp did not

constitute opposition to violations of the Persons With Disabilities Act, MCL 37.1602(a) sufficient to support a retaliation claim.)

In *Barrett, supra,* 245 Mich App at 317-318, the Court of Appeals reviewed whether the plaintiff had established a prima facie case of retaliation based on an oral complaint. It should be noted that the facts in *Barrett* were unusual in that it was a male plaintiff alleging a retaliation claim against his employer essentially on the basis that the plaintiff's supervisor, also a male, treated the plaintiff poorly after the supervisor learned that the plaintiff was dating a woman the supervisor was interested in romantically. The plaintiff alleged that he orally complained of the treatment to an executive, but to the extent that the executive took no action, it constituted retaliation for his oral complaint. In concluding that the plaintiff had not made a "charge" as defined in § 701(a), the Court stated:

> Plaintiff did not take any action that could be construed as a "charge" under the act. An employee need not specifically cite the CRA when making a charge under the act. However, the employee must do more than generally assert unfair treatment. See *Mitan v Neiman Marcus,* 240 Mich App 679, 682; 613 NW2d 415 (2000) (holding complaints amounting to generic claims of "job discrimination" 0did not qualify as a charge made under the Persons with Disabilities Act, MCL 37.1101 *et seq.*[ ]). *The employee's charge must clearly co0nvey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA. McLemore v Detroit Receiving Hosp & Univ Medical Center,* 196 Mich App 391, 396; 493 NW2d 441 (1992). Plaintiff's oral complaint to Franke in January 1994 failed to meet this standard. Plaintiff alleges unlawful discrimination because of sex. According to plaintiff, he complained to Franke that [the plaintiff's supervisor] had severely limited or closed the line of communication between [him] and plaintiff. Plaintiff further claimed [the supervisor] had implemented policies that were enforced only with respect to plaintiff. Plaintiff asserted [the supervisor's] conduct changed after [the supervisor] discovered plaintiff and Goshorn were involved romantically. Plaintiff never complained that he was subjected to any physical or verbal conduct of a sexual nature relating to either plaintiff or Goshorn. Nor did plaintiff complain that he was treated differently because of his gender. Under these circumstances, an objective employer could not conclude that plaintiff was raising the specter of a claim pursuant to the CRA. Rather, the evidence merely established that plaintiff was asserting generic, non-sex-based complaints regarding his working conditions and that those complaints were not based on sex. [*Id.* at 318-319 (emphasis added).]

The Court of Appeals thereafter concluded that the plaintiff did not "oppose" a violation of the CRA because the conduct complained of did not constitute a violation of the CRA. *Id.* at 319-321.

Recently, in *Rymal v Baergen*, ___ Mich App ___; ___ NW2d ___ (2004); 2004 Mich App LEXIS 1403, the Court of Appeals again addressed whether a plaintiff had established a prima facie claim of retaliation based on the plaintiff's alleged oral complaint of sex harassment or discrimination. In *Rymal*, the plaintiff's male supervisor propositioned the plaintiff to have a sexual relationship, which she declined. *Id.* at *3. After that, the supervisor became verbally abusive, reassigned the plaintiff's duties to other employees, and denied the plaintiff certain benefits. *Id.* at * 4-5. The plaintiff testified that she orally complained to a human resources executive of the company, who was also an attorney, about the supervisor's behavior. Although she apparently used the words "harassment" and "discrimination" the plaintiff did not specifically claim "sex harassment" or "sex discrimination." The plaintiff eventually left her job and filed suit alleging sex harassment and retaliation. *Id.* The trial court granted summary disposition regarding the retaliation claim, but the Court of Appeals reversed, concluding that the plaintiff had made out a prima facie claim. *Id.* at *54. The Court stated:

> We reject defendants' argument that plaintiff did not engage in protected activity because she did not specify the sexual nature of Baergen's misconduct when speaking to Fraser [the attorney]. MCL 37.2701(a) prohibits retaliation where a party lodges a charge or a complaint about a violation of the CRA. While we acknowledge that plaintiff's deposition testimony did not specify sexual misconduct, MCL 37.2103 and MCL 37.2202 prohibit sexual harassment and discriminatory practices, and plaintiff testified that she expressly communicated to Fraser, an attorney, that she was being harassed and discriminated against by Baergen. In *McLemore, supra* at 396, this Court, addressing a similar issue, stated:
>
> > In *Booker v Brown & Williamson Tobacco Co, Inc,* 879 F.2d 1304, 1312-1314 (CA 6, 1989), the federal court of appeals decided that the Civil Rights Act did not protect from retaliation an employee

> who had merely expressed concern to his employer about possible discrimination. We strongly disagree with this interpretation of the act. Regardless of the vagueness of the charge or the lack of formal invocation of the protection of the act, if an employer's decision to terminate or otherwise adversely affect an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs. We will not interpret the act to allow employers to peremptorily retaliate against employees with impunity.
>
> Here, regardless of plaintiff's failure to formally invoke protection under the CRA while speaking with Fraser, her claims of demeaning conduct and communication, harassment, and discrimination by a male boss, especially when made to an attorney, minimally created a factual issue whether plaintiff raised the specter of a discrimination complaint and was thus engaged in protected activity.[15]

15. We acknowledge this Court's decision in *Mitan v Neiman Marcus,* 240 Mich App 679, 681-682; 613 NW2d 415 (2000), wherein the panel, after citing *McLemore,* concluded that the plaintiff's written complaints to a human resource director were not sufficient where the complaints spoke only of job discrimination and harassment without stating, implying, or raising the specter of a handicapper violation. The Court found further support for its decision in the plaintiff's deposition testimony which indicated that she admitted to the human resource director that she was treated the same as everyone else. *Id.* at 682-683. The short per curiam opinion contains no discussion of background facts so we cannot ascertain the nature of the handicap and the knowledge that others may have had of the particular handicap. We find here that the specter of a sexual harassment discrimination suit was raised or could be implied where a female employee complained to an attorney executive of discrimination, harassment, and demeaning conduct and communication by a male boss. Further, plaintiff never conceded that she was not treated differently. Considering the language of *McLemore*, we conclude, while viewing the evidence in a light most favorable to plaintiff, that plaintiff, when speaking to Fraser, was engaged in protected activity under MCL 37.2701. Defendants' reliance on *Barrett, supra,* is misplaced because there the specter of gender discrimination could not be discovered or implied in that the plaintiff was male as was the employee whose actions plaintiff challenged, and where this Court found that the true nature of the CRA action was predicated on romantic jealousy over a mutual girlfriend. *Id.* at 319-322. [*Id.* at *56-57.]

Notably, in its discussion the *Rymal* Court rejected the plaintiff's argument that her rejection of the defendant's sexual advances constituted protected activity for purposes of the antiretaliation provision of the CRA. *Id.* at * 36 n7. The court noted "[t]hat would simply constitute protected

activity for the sexual harassment action." *Id.* *Rymal* is the latest published pronouncement by the Court of Appeals regarding what constitutes protected activity opposing a violation of the CRA.[4]

These cases clearly reveal that the specter of discrimination language has not been extended to encompass an asserted "physical" "opposition" to a violation of the act like that alleged in the instant case. What they do not reveal, however, is a clear, understandable test with regard to what constitutes protected "opposition" activity. The amorphous "raising the spectre" language used by the *McLemore* Court, and consistently referenced by the Court of Appeals, has generated confusion in the employer community with regard to what a reasonable and objective employer must be on the lookout for when an employee approaches management.

Notably, this vague standard for establishing opposition activity sufficient to assert a retaliation claim contrasts with the more rigorous standard for establishing the analogous notice element of respondeat superior liability in a sexual harassment claim.[5] In *Chambers, supra*, 463 Mich at 319 (2000), this Court opined that notice of sexual harassment sufficient to impute

---

[4] Amicus curiae respectfully disagrees with the majority's conclusion in *Rymal* that the two telephone calls to the attorney human resources supervisor constituted protected activity. The essence of the majority's analysis was that because the plaintiff was a woman, and because she was complaining of "harassment" or "discrimination" by a male supervisor, the attorney supervisor should have assumed or inferred that she was complaining of sexual harassment. Such reasoning by the court is insufficient. Notably, Judge Kelly disagreed with the majority's conclusion that the plaintiff had sufficiently pled a retaliation claim. In her concurring and dissenting opinion, Judge Kelly concluded that the plaintiff's two telephone calls to the attorney executive did not qualify as protected activity:

> An employee "must do more than generally assert unfair treatment." An employee "must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA." "Generic, non-sex-based" complaints are insufficient. Therefore, plaintiff's two telephone conversations with Fraser were not protected activities under MCL 37.2701." *Id.* at * 73.

liability to an employer exists where, "by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of the substantial probability that sexual harassment was occurring." This Court pointed out that "an employer cannot be expected to correct such harassment unless the employer has reason to know that it is occurring." *Id.*, citing *Perry v Harris Chernin, Inc*, 126 F3d 1010, 1014 (CA 7, 1997). This discrepancy in standards, which essentially makes it easier to establish a retaliation claim than an actual claim of discrimination or harassment, does not appear warranted. Again, opposition activity is generally granted less protection by the courts than participation activity. *Comiskey*, *supra,* at 897-898. Furthermore, in opposition cases courts should balance the purpose of the anti-retaliation provision "to protect persons engaging reasonably in activities opposing discrimination," with the "desire not to tie the hands of employers in . . . the control of personnel." *Id.* Accordingly, there does not seem to be any reason why a similar test cannot, or should not, be employed to determine whether a plaintiff has engaged in protected opposition activity.

In this case, Plaintiff's reflexive striking of Mr. Habkirk clearly does not fall within what has been considered protected opposition activity by the courts, or within the test suggested above. No complaint is apparent from Plaintiff's silent slugging of Mr. Habkirk. There is no apparent relationship between her striking her supervisor and her subsequent allegation that she was opposing sexual harassment. The touch on her shoulder was not sexually inappropriate and Plaintiff had not previously been the subject of sexual harassment by Mr. Habkirk. Under these circumstances, there is no reason to believe that Mr. Habkirk could have understood that Plaintiff's striking was in opposition to sexual harassment of her coworkers. There is simply no support in Michigan law for Plaintiff's claim that her slugging of Mr. Habkirk constituted

---

[5] Again, to establish a retaliation claim a plaintiff must show that she engaged in a protected activity and that her employer had notice of the activity. *DeFlavis*, *supra,* at 436. These two

"opposition" to sexual harassment under § 701. Amicus curiae therefore asserts that this Court should not expand the concept of protected opposition activity to include acts of physical retaliation by a non-victim plaintiff.

C. This Court should not expand Michigan law to recognize physical retaliation by a plaintiff as a protected activity for purposes of establishing a prima facie case of retaliation under the CRA.

Plaintiff characterized the incident with Mr. Habkirk as a "slugging" by which she "forcefully oppos[ed] his practice of sexual harassment." (Plaintiff's Brief in Response to Appellant's Application for Leave to Appeal, pp 1, 8.)[6] Thus, Plaintiff portrays the incident as a violent physical encounter with her supervisor. There is no legal support, however, for Plaintiff's claim that when she struck Mr. Habkirk, she engaged in protected activity by opposing sexual harassment. This is supported by the fact that federal courts are divided regarding whether a plaintiff, **who is the actual victim of sexual harassment or discrimination**, can assert such a claim.[7]

There is dissention amongst the federal courts regarding whether physical resistance to sexual harassment by a **victim** constitutes protected activity necessary for establishing a retaliation claim.[8] In *Cruz v Coach Stores, Inc*, 202 F3d 560 (CA 2, 2000), the United States

---

elements are frequently intertwined.

[6] Arguably, this portrayal of the incident by Plaintiff's counsel appears inconsistent with Plaintiff's testimony that her action was essentially reflexive, but for purposes of this argument, Amicus will accept Plaintiff's recitation of the facts.

[7] In contrast to the comment in *Rymal, supra*, there is one unpublished decision by the Michigan Court of Appeals that assumed for purposes of the opinion that the plaintiff's refusal of sexual advances qualified as protected activity. See *Yost v PAYCHEX, Inc*, unpublished opinion per curiam by the Michigan Court of Appeals, Docket No. 199135, dec'd 9/29/98; 1998 Mich App LEXIS 968.

[8] Recently, in *Roberts v County of Cook*, 2004 US Dist LEXIS 8089 (May 7, 2004), the United States District Court for the Northern District of Illinois observed that:

> District judges are divided on the issue. Several judges of this Court have stated that the refusal of sexual advances does not constitute protected activity, *see*

Court of Appeals for the Second Circuit addressed the issue. There, the female plaintiff filed race and sex discrimination and retaliation claims against her employer after she was terminated. The plaintiff was terminated after she slapped a male coworker who made sexually inappropriate comments to the plaintiff just before she slapped him. *Id.* at 564. The defendant employer terminated both employees pursuant to its rule against "physical or verbal assault while on company premises." *Id.* at 565 (internal quotations omitted.) The plaintiff alleged that the employer terminated her in retaliation for "defend[ing] herself against Heriveaux's sexual harassment and physical assault." *Id.* at 566. The Second Circuit concluded:

> In this case, Cruz did not make out a prima facie case of retaliation because she did not claim to have engaged in any "protected activity" within the meaning of the statute. Slapping one's harasser, even assuming *arguendo* that Cruz did so in response to Title VII-barred harassment, is not a protected activity. While the law is clear that opposition to a Title VII violation need not rise to the level of a

---

Jones v. County of Cook, 2002 U.S. Dist. LEXIS 13075, No. 01 C 9876, 2002 WL 1611606, at *4 (N.D. Ill. July 17, 2002); *Bowers v. Radiological Society of North America, Inc.,* 57 F. Supp. 2d 594, 599 (N.D. Ill. 1999); *Speer v. Rand McNally & Co.,* 1996 U.S. Dist. LEXIS 17071, No. 95 C 6269, 1996 WL 667810, at *8 n.4 (N.D. Ill. Nov. 15, 1996), *Finley v. Rodman & Renshaw, Inc.,* 1993 U.S. Dist. LEXIS 17308, No. 93 C 5504, 1993 WL 512608, at *3 (N.D. Ill. 1993), as has one judge in the District of Maryland, *Rachel-Smith v. FTData, Inc.,* 247 F. Supp. 2d 734, 748-49 (D. Md. 2003), and three in New York. *See Fitzgerald v. Henderson,* 36 F. Supp. 2d 490, 499 (N.D.N.Y. 1998), *aff'd in part, rev'd in part on other grounds,* 251 F.3d 345 (2d Cir. 2001); *Rashid v. Beth Israel Medical Center,* 1998 U.S. Dist. LEXIS 15602, No. 96 Civ. 1833, 1998 WL 689931, at *2 (S.D.N.Y. Oct. 2, 1998); *Del Castillo v. Pathmark Stores, Inc.,* 941 F. Supp. 437, 438-39 (S.D.N.Y. 1996). But there is an equal number of district court judges who have found the refusal of sexual advances to constitute protected activity. *See Little,* 210 F. Supp. 2d at 385-86; *Black v. City & County of Honolulu,* 112 F. Supp. 2d 1041, 1049 (D. Haw. 2000); *Farrell v. Planters Lifesavers Co.,* 22 F. Supp. 2d 372, 392 (D.N.J. 1998), *aff'd in part, rev'd in part on other grounds,* 206 F.3d 271 (3d Cir. 2000); *Fleming v. South Carolina Department of Corrections,* 952 F. Supp. 283, 288 (D.S.C. 1996); *Armbruster v. Epstein,* 1996 U.S. Dist. LEXIS 7459, No. Civ. A 96-CV-1059, 1996 WL 289991, at *3 (E.D. Pa. May 31, 1996); *EEOC v. Domino's Pizza,* 909 F. Supp. 1529, 1536 (M.D. Fla. 1995); *Burrell v. City University of New York,* 894 F. Supp. 750, 761 (S.D.N.Y. 1995); and *Boyd v. James S. Hayes Living Health Care Agency, Inc.,* 671 F. Supp. 1155, 1167 (W.D. Tenn. 1987). [*Id.* at * 11-12.]

> formal complaint in order to receive statutory protection, this notion of "opposition" includes activities such as "making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges." *Sumner v. United States Postal Serv.*, 899 F2d 203, 209 (2d Cir. 1990). *It does not constitute a license for employees to engage in physical violence in order to protest discrimination.*
>
> We need not decide here whether violence in opposition to Title VII-prohibited behavior might, in some circumstances, be protected under Title VII's retaliation provision. In the situation at bar, Cruz had many options for resisting Heriveaux's offensive behavior, including leaving the room and reporting the incident to Human Resources. She selected none of these options, however, but chose instead to respond by slapping Heriveaux. Under these circumstances, Cruz's decision -- even if, as she claims, she believed herself to be acting in self-defense -- does not enjoy the protection of Title VII. Because Cruz engaged in no "protected activity," therefore, she has not established a prima facie case for retaliatory discharge. [*Id.* at 566-567 (emphasis added).][9]

A more compelling factual situation was presented in *Van Horn v Specialized Support Services, Inc*, 241 F Supp 2d 994 (SD Iowa, 2003). There, the female plaintiff, a caregiver of mentally disabled persons, had repeatedly complained to her employer regarding inappropriate touching by one of the mentally disabled male clients, including a prior occasion where the young man had touched her breast. The employer did nothing to assist the plaintiff or address the issue. Subsequently, the young man pinched the plaintiff's breast near the nipple causing her pain. *Id.* at 1004. "In reaction to the pain, [the plaintiff] instinctively slapped [the young man] on the left side of his face." *Id.* The plaintiff characterized the slap as a "reflex" and not "intentional." *Id.* The plaintiff was subsequently terminated because of the incident. *Id.* at 1005-1006. The plaintiff filed a sexual harassment and retaliation claim against her employer. With regard to the retaliation claim, the plaintiff alleged that she engaged in protected activity opposing sexual

---

[9] Other courts have concluded that even the broadest interpretation of a retaliation claim cannot encompass instances where the alleged "protected activity" consists simply of declining a harasser's sexual advances. "If it were otherwise, every harassment claim would automatically state a retaliation claim as well." See *Del Castillo v Pathmark Stores, Inc*, 941 F Supp 437, 439 (SDNY, 1996).

harassment when she slapped the client. *Id.* at 1010. In addressing whether the "slap" was protected oppositional activity, the *Van Horn* Court concluded:

> As *Folkerson* and *Cruz* illustrate, the real crux of the matter is whether physical opposition to workplace harassment can ever be "reasonable." It is clear that Title VII does not grant employees license to engage in physical violence in order to protest discrimination. *See Cruz,* 202 F.3d at 566. Unlawful, disruptive, or unreasonable protests against discrimination fall outside the scope of Title VII's protections. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Matima v. Celli,* 228 F.3d 68 (2nd Cir. 2000). *See also Kempcke v. Monsanto Co.,* 132 F.3d 442, 445 (8th Cir. 1998) (quoting Hochstadt *v. Worcester Foundation for Experimental Biology,* 545 F.2d 222, 230 (1st Cir. 1976)). However, the law is equally clear that an individual who is unlawfully attacked and has no opportunity to seek legal recourse may reasonably act to defend against physical harm. *See* 1 Wayne R. LaFave & Austin W. Scott., Jr., Substantive Criminal Law § 5.7(a) (1986). *See also* Restatement (Second) of Torts §§ 63-66 (recognizing the right to the use of force in self-defense). Therefore, where employees find themselves in such an exigency and act in their own defense, they are not engaging in "unreasonable" oppositional activity. The Court reads *Bosley* to compel essentially the same conclusion--that when an employer's failure to act forces an employee to act in self-defense at the workplace, the employee's defensive conduct is reasonable and the employee cannot be terminated for doing so. *Bosley,* 165 F.3d at 639.
>
> In the vast majority of cases, of course, self-defense will not be a reasonable response to workplace harassment. Where other options are available, as in *Cruz,* an employee might reasonably be expected to oppose workplace harassment without resort to actual physical resistance. In Ms. Van Horn's case, however, the utter failure of SSS to protect her from escalating sexual harassment by her client forced her into a situation where on November 6, 2001, she was the victim of a direct assault. At the time Ms. Van Horn slapped her client (a grown man), he was physically restraining her by squeezing her breast. . . . Under these circumstances, Ms. Van Horn's slapping her client was reasonable self-defense against harassment and was therefore protected oppositional activity under Title VII. [*Id.* at 1012-1013.]

These cases reveal that there are, perhaps, competing policy questions involved in addressing whether physical retaliation by a plaintiff-victim may be protected activity, i.e. a victim's right to defend herself (or himself) versus an employer's right to prohibit workplace violence.[10] Fortunately, the Court is not confronted with that particular question. Rather, this Court must

decide the easier question of whether physical retaliation by a nonvictim plaintiff may be protected activity. Arguably, if a victim's retaliation is not protected activity, a non-victim's physical retaliation on behalf of a victim cannot be protected activity. More importantly, however, the specific concerns noted by the *Van Horn* Court, and others like it, are clearly not present when a nonvictim plaintiff physically retaliates allegedly on behalf of a victim. Such a plaintiff is not personally defending himself or herself against conduct prohibited by the CRA (or Title VII). Indeed, it is difficult if not impossible to imagine circumstances pursuant to which physical retaliation by a non-victim plaintiff could ever be considered reasonable opposition to harassment or discrimination. In this case, Plaintiff could have demonstrated her opposition to Mr. Habkirk's alleged sexual harassment in a variety of other "reasonable" ways. For example, she could have written a letter or spoken to her immediate supervisor. "Slugging" Mr. Habkirk was not reasonable. Physical retaliation under such circumstances cannot be considered within the scope of activities contemplated as protected opposition activity. Moreover, this behavior does not "speak out" in opposition to prohibited conduct.

For example, in *Rachel-Smith v FTDATA, Inc*, 247 F Supp 2d 734 (D Md, 2003), the female plaintiff brought claims of quid pro quo sexual harassment, retaliation and hostile work environment against her employer. The plaintiff claimed that she opposed sexual harassment by the general manager of her employer by physically refusing his advances, and stating in an email to the general manager that she wished to cease all kissing and other sexual episodes with him out of respect for her marriage and her religious and moral beliefs. *Id.* at 741-742, 749 n6. The *Rachel-Smith* Court opined:

> The question . . . is whether the specific actions that Plaintiff took -- the e-mail and verbal communication to McLallen requesting him to cease his sexual

---

[10] Amicus Curiae expresses no opinion regarding whether physical retaliation by a plaintiff-victim should be considered protected activity.

advances -- are protected as opposition to an unlawful practice.

> "To fall under the protection of the opposition clause . . ., behavior need not rise to the level of formal charges of discrimination. The opposition clause has been held to encompass informal protests, such as voicing complaints to employers or using an employer's grievance procedures." *Armstrong v. Index Journal Company*, 647 F.2d 441, 448 (4th Cir. 1981) (internal citations omitted). The Equal Employment Opportunity Commission (EEOC) has also identified a number of examples of conduct protected by the opposition clause including complaining (to management, unions, other employees, or newspapers) about allegedly unlawful practices and refusing to obey an order because the employee believes it is unlawful under Title VII. *See EEOC Compliance Manual*, (CCH) P8006; *see also Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000) (citing the EEOC Compliance Manual). Central to all of these illustrative examples of behavior protected by the opposition clause is the element of speaking out against a practice, *see, e.g., Chappell v. Southern Maryland Hosp., Inc.*, 320 Md. 483, 494, 578 A.2d 766, 772 (1990) ("The opposition and participation clauses . . . have been liberally applied by the courts to shield employees who speak out against an employer's unlawful employment practices . . ."); *see also Armstrong*, 647 F.2d at 448 ("The opposition clause has been held to encompass informal protests, such as voicing complaints to employers . . ."), because the plaintiff believes it is illegal. The purpose of this speaking out or reporting requirement is a logical one: in order to protect an employee from an employer's retaliation for opposing a practice, the employer must first have been placed on notice of a problematic practice. *See Berg v. La Crosse Cooler Co.*, 612 F.2d 1041, 1045 (7th Cir. 1980) ("By protecting employees from retaliation, [§ 2000e-3(a)] is designed to encourage employees to call to their employers' attention discriminatory practices of which the employer may be unaware . . . ."); *see also Snoke v. Staff Leasing, Inc.*, 43 F. Supp.2d 1317, 1328 (M.D. Fla. 1998) (finding the plaintiff's activity was not protected because "[the plaintiff's] complaints would not place an employer on notice that an employee was complaining about an unlawful employment practice under Title VII.").
>
> Plaintiff's actions here fall short of the standard for protected activity under the opposition clause. To the extent that Plaintiff communicated only that McLallen should cease his sexual advances, Plaintiff failed to communicate that she was requesting this because she believed his advances to be illegal. Second, both of Plaintiff's communications were made to McLallen only. To the extent that her actions needed to speak out against McLallen's behavior or report the behavior to either an authority or an outsider in order to be protected by the opposition clause, both the e-mail and verbal communication fail in this regard. [*Id.* at 748-749.]

Plaintiff's slugging of Mr. Habkirk cannot be considered opposition to the sexual harassment of her co-workers. It was not an act speaking out against sexual harassment, particularly where the touch was not sexual and where no one knew of the event other than its participants. Physical

retaliation by a non-victim plaintiff cannot be considered protected activity. To conclude otherwise would expand the concept of protected opposition activity well-beyond the intent of the CRA, and essentially condone violence in the workplace. The Court of Appeals' decision in this case creates an unacceptable precedent that physical retaliation by an employee is an acceptable means of opposing a violation of the CRA. The decision must be reversed as contrary to policy, and because it is clearly unsupported by either Michigan or federal law.

II. Michigan's continuing violations doctrine as set forth in *Sumner v Goodyear Tire & Rubber Co*, should be abrogated or at least modified in light of the United States Supreme Court's ruling in *Nat'l Rail Passenger Corp (Amtrak) v Morgan*.

In 1986, almost two decades ago, in *Sumner, supra,* 427 Mich 505, this Court adopted version of the federally-created continuing violations theory for application in the context of suits under the CRA. The theory provides an exception to the three-year statute of limitations that generally applies to actions under the CRA, and was adopted "in an effort to lessen the harsh effects of strict adherence to the requirements of the statute of limitation. The theory allows a plaintiff to seek damages for violations that occurred outside the limitations period if the violations are 'continuing' in nature and at least one of the discriminatory acts falls within the statutory limitation period." *Rasheed v Chrysler Motors Corp*, 196 Mich App 196, 207; 493 NW2d 104 (1992), rev'd on other grds, 445 Mich 109. In 2002, the United States Supreme Court abrogated use of the continuing violations doctrine with respect to employment discrimination claims based on discrete acts in *Amtrak, supra,* 536 US 101. The Supreme Court concluded that application of the doctrine was contrary to the specific language and intent of Title VII with regard to such claims. This Court is often guided in its interpretation of the CRA by federal court interpretations of Title VII, the CRA's federal counterpart. See *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993); *Chambers v Trettco, Inc*, 463 Mich 297,

313; 614 NW2d 910 (2000). Amicus curiae submits that this is an occasion where following the Supreme Court's interpretation of Title VII is consistent with the purpose and intent of the CRA.

A. Michigan's continuing violations doctrine as adopted in *Sumner v The Goodyear Tire & Rubber Co.*

The *Sumner* decision involved three consolidated cases challenging the 90-day period of limitation under the Fair Employment Practices Act, MCL 423.301 *et seq*, the three-year period of limitation under the CRA, and the three-year period of limitation under the Handicappers' Civil Rights Act, MCL 37.1101 *et seq*. [11] On appeal to this Court, all three cases raised questions regarding the continuing violations doctrine, which provided this Court with its first opportunity to address the doctrine.

In beginning its analysis, the *Sumner* Court noted that "the doctrine was developed by the federal courts in the context of Title VII . . . and continues to play an important role in federal discrimination law. It is therefore appropriate that we, as we have done in the past in

---

[11] In *Robson v General Motors*, the plaintiff, who had scoliosis, brought an action under the HCRA, after General Motors' physicians refused to certify him as fit for test-driving vehicles, first in 1978 then in 1980 and 1981, even though they had done so for years. *Sumner*, *supra* at 512. The plaintiff complained of the decision on numerous occasions, but was transferred to a different division where he was eventually laid off. The plaintiff filed suit in 1982, seeking reinstatement and back pay. The trial court granted GM's motion for summary disposition on the basis that the plaintiff's claims were barred by the three-year statute of limitations. *Id.* at 513. In *Sumner v Goodyear Tire & Rubber Co*, the plaintiff, a black male, brought suit under FEPA, after he was terminated for striking a white male supervisor. *Id.* at 515. The plaintiff alleged that he had been subjected to numerous racially offensive and derogatory remarks by several supervisors between 1971and 1974, which culminated in his striking a supervisor. *Id.* Ultimately, the plaintiff's claims were found to be timely under the ninety-day time period under FEPA, because the trial court used the date of the plaintiff's termination, and not the date of the fight. *Id.* at 515-517. In *Knight v Blue Cross/Blue Shield of Michigan*, the female plaintiff brought suit under the CRA alleging that her supervisor sexually harassed her and sexually discriminated against her on numerous occasions between 1973 until her resignation in 1975. *Id.* at 518-520. The plaintiff filed suit in 1978. *Id.* at 522. On appeal from her jury trial verdict, the plaintiff alleged that trial court erred in not instructing the jury that it could consider damages for the harassment that occurred outside the three-year statute of limitations because it was part of a continuing violation. *Id.* at 523-524. The Court of Appeals considered the issue moot, and did not decide it on the merits. *Id.* at 524.

discrimination cases, turn to federal precedent for guidance in reaching our decision." *Id.*, 427 Mich at 525. The Court observed:

> In the late 1960's, federal courts began to refuse to automatically dismiss cases where the complaint had not been filed in a timely fashion. These courts expressed concern with a number of factors which they felt militated against a strict application of the limitation requirement. First, Title VII is a remedial statute whose purpose is to root out discrimination and make injured parties whole. Second, employees are generally lay people, who do not know that they must act quickly or risk losing their cause of action. An employee may fear reprisal by the employer, or may refer the matter to a union, which may not take any action within the limitation period. Employees may also delay filing their complaints in the hope of internal resolution or simply to give the employer a second chance. Third, and most importantly, many discriminatory acts occur in such a manner that it is difficult to precisely define when they took place. One might say that they unfold rather than occur. [*Id.* at 525-526.]

After noting these federal policy considerations, the *Sumner* Court essentially recounted the legal development of the continuing violations doctrine through a series of United States Supreme Court Opinions in *United Air Lines, Inc v Evans*, 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977), *Delaware State College v Ricks*, 449 US 250; 101 S Ct 498; 66 L Ed 2d 431 (1980), and *Chardon v Fernandez*, 454 US 6; 102 S Ct 28; 70 L Ed 2d 6 (1981), and described the doctrine:

> In the wake of *Evans*, the continuing violation doctrine was analyzed in terms of three subtheories: 1) a "policy of discrimination," 2) a "continuing course of conduct," and 3) the "present effects of past discrimination."
>
> The first subtheory involves allegations that an employer has engaged in a continuous policy of discrimination. In such a case, the plaintiff is alleging that "he is challenging not just discriminatory conduct which has affected him, but also, or alternatively, the underlying employment system which has harmed or which threatens to harm him and other members of his class."
>
> The second subtheory, the "continuing course of conduct" or "series of events" situation is relevant where an employee challenges a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period.
>
> The third subtheory, by all accounts, ceased to be actionable after *Evans*. That subtheory held that a continuing violation existed where a party suffered timely effects or injury from a past untimely act of discrimination. [*Id.* at 528 (citations omitted).]

With respect to the "continuing course of conduct" theory, the *Sumner* Court adopted a test set forth by the United States Court of Appeals for the Fifth Circuit in *Berry v LSU Bd. of Supervisors*, 715 F2d 971 (CA 5, 1983) for determining whether a discriminatory course of conduct exists:

> "The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" [*Sumner, supra* at 538, quoting *Berry, supra* at 981.]

Thus, after its review of federal law, the *Sumner* Court held that a plaintiff may file a discrimination complaint outside the period of limitation if the plaintiff demonstrates either a policy of discrimination or a continuing course of discriminatory conduct under the relevant factors.

Notably, nowhere in its opinion did the *Sumner* Court address Michigan law or policy with regard to this issue. The Court apparently accepted the federal courts' concerns, despite the fact that the doctrine was created as a way to circumvent the short periods of limitation under Title VII. Indeed, the *Sumner* Court did not analyze or offer any comment regarding whether the doctrine was necessary in light of the much longer statutes of limitation incorporated by the CRA and the HCRA, two of the acts at issue in *Sumner*. The concerns expressed by the federal courts related to the short, federal filing periods are mitigated by the three-year statute of limitations applicable to the CRA and the HCRA. Since *Sumner*, the continuing violations doctrine has been discussed or applied in numerous published and unpublished opinions of the Michigan

Court of Appeals, including the present case. In fact this case presents a good example of why the continuing violations doctrine should be abrogated in light of the decision in *Amtrak.*

B. ***Amtrak v Morgan*: The facts.**

In *Amtrak, supra*, 536 US 101, the plaintiff, Morgan, sued Amtrak under Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e *et seq.*, alleging that he had been subjected to discrete discriminatory and retaliatory acts and had experienced a racially hostile work environment throughout his employment. 536 US at 104. Section 2000e-5(e)(1) requires that a Title VII plaintiff file a charge with the Equal Employment Opportunity Commission (EEOC) either 180 or 300 days "after the alleged unlawful employment practice occurred." On granting the petition for writ of certiorari, the Supreme Court was asked to consider "whether, and under what circumstances, a Title VII plaintiff may file suits on events that fall outside this statutory time period." 536 US at 105.

Morgan, a black male, filed a charge of discrimination and retaliation on February 27, 1995, against Amtrak with the EEOC and cross-filed with the California Department of Fair Employment and Housing. *Id.* Morgan alleged that during the time period that he worked for Amtrak, he was "'consistently harassed and disciplined more harshly than other employees on account of his race.'" *Id.*[12] The EEOC issued a notice of right to sue on July 3, 1996, and Morgan filed his lawsuit on October 2, 1996. *Id.* at 106. While some of the alleged discriminatory acts Morgan complained of occurred within 300 days of the time he filed his charge with the EEOC, many took place before that time period. *Id.*

[12] Morgan alleged that the discrimination began when Amtrak hired him in August 1990 as an electrician helper rather than an electrician. 536 US at 106 n1. Other discriminatory acts included termination for refusing to follow orders, refusal to allow him to participate in an apprenticeship program, numerous written counselings for absenteeism, as well as racially derogatory language used against him by supervisors. *Id.* at n2.

Amtrak moved for summary judgment, arguing that it was entitled to dismissal regarding all incidents that occurred more than 300 days before the filing of Morgan's EEOC charge. The federal District Court agreed, holding that Amtrak could not be liable for conduct occurring before May 3, 1994. *Id.* The District Court used a test established by the United States Court of Appeals for the Seventh Circuit that a "'plaintiff may not base [the] suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.'" *Id.*, quoting *Galloway v General Motors Service Parts Operations*, 78 F3d 1164, 1667 (CA 7, 1996). Thus, the District Court concluded that "because Morgan believed that he was being discriminated against at the time that all of these acts occurred, it would not be unreasonable to expect that Morgan should have filed an EEOC charge on these acts before the limitations period on these claims ran." *Id.*[13]

Morgan appealed, and the United States Court of Appeals for the Ninth Circuit reversed, relying on its articulation of the continuing violation doctrine, "which 'allows courts to consider conduct that would ordinarily be time barred "as long as the untimely incidents represent an ongoing unlawful employment practice."'" *Id.*, at 106-107, quoting *Amtrak v Morgan*, 232 F3d 1008, 1014 (CA 9, 2000), quoting *Anderson v Reno*, 190 F3d 930, 936 (CA 9, 1999). Thus, "[c]ontrary to both the Seventh Circuit's test, used by the District Court, and a similar test employed by the Fifth Circuit, the Ninth Circuit held that its precedent 'precludes such a notice limitation on the continuing violation doctrine.'" *Id.*, quoting 232 F3d at 1015.[14]

---

[13] The District Court denied summary judgment with respect to timely claims. These claims proceeded to trial, where the jury returned a verdict in favor of Amtrak. 536 US at 106.

[14] The Fifth Circuit case referred to by the Court is *Berry, supra,* 715 F2d at 981, which the *Sumner* Court adopted, and which uses a multi-factor test taking into account: "(1) whether the

The Supreme Court noted that under the Ninth Circuit's view, a plaintiff can establish a continuing violation that allows recovery for claims filed outside of the statutory period in two ways. First, by showing "a series of related acts one or more of which are within the limitations period." *Id.* at 107 (internal citations omitted). A serial violation is established if the alleged acts of discrimination occurring before the limitations period are "sufficiently related" to the acts occurring within the period. *Id.* The alleged incidents "cannot be isolated, sporadic, or discrete." *Id.* (internal quotations omitted.) Second, a plaintiff may establish a continuing violation if he shows "a systematic policy or practice of discrimination that operated, in part, with the limitations period – a systematic violation." *Id.* (internal citations omitted.)

The Ninth Circuit concluded that Morgan's pre-limitations period conduct was sufficiently related to the post-limitations conduct with respect to Morgan's three separate claims of discrimination, hostile environment and retaliation, and reversed. *Id.*, at 108.

C. ***Amtrak v Morgan*: The Holding**

The Supreme Court noted that the federal appellate courts and district courts have taken various approaches to the question whether acts that fall outside of the statutory time period for filing charges set forth in § 2000e-5(e) are actionable under Title VII, but that **"none are compelled by the text of the statute."** 536 US at 108 (emphasis added.) The Court noted its tendency to require "strict adherence" to procedural requirements specified by Congress. *Id.* The Court continued, "our most salient source for guidance is the statutory text" in this case:

> For our purposes, the critical sentence of the charge filing provision is: "A charge under this section *shall be filed* within one hundred and eighty days *after the alleged unlawful employment practice occurred.*" The operative terms are "shall," "after . . . occurred," and "unlawful employment practice." "Shall" makes the act

---

alleged acts involve the same type of discrimination; (2) whether the incidents are recurring or independent and isolated events; and (3) whether the earlier acts have sufficient permanency to trigger the employee's awareness of and duty to challenge the alleged violation." *Amtrak, supra* at 107 n3.

> of filing a charge within the specified time period mandatory. "Occurred" means that the practice took place or happened in the past. The requirement, therefore, that the charge be filed "after" the practice "occurred" tells us that a litigant has up to 180 or 300 days after the unlawful practice happened to file a charge with the EEOC.
>
> The critical questions, then, are: What constitutes an "unlawful employment practice" and when has that practice "occurred"? Our task is to answer these questions for both discrete discriminatory acts and hostile work environment claims. The answer varies with the practice. [*Id.*, at 109-110 (citations omitted.)]

1. Title VII claims based on discrete, discriminatory acts are not subject to the continuing violations doctrine.

The Supreme Court reached a quick answer with respect to discrete acts, stating "**[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'** A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it." *Id.* at 110 (emphasis added). The Court rejected Morgan's argument that the term "practice" in "unlawful employment practice" "connotes an ongoing violation that can endure or recur over a period of time." *Id.* The Court disagreed noting the § 2000e-2 explains what actions qualify as "unlawful employment practices" and that section specifically includes discrete acts. *Id.* at 110-111. After reviewing several prior decisions, including *United Air Lines*, *supra*, and *Delaware State College*, *supra*, which the *Sumner* Court relied on in its analysis, and which interpreted the term "practice" to apply to discrete acts, and that discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period, the Court stated:

> We derive several principles from these cases. First, discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior

acts as background evidence in support of a timely claim.

> As we have held, however, this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel. Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly.
>
> The Court of Appeals applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to that act may also be considered for the purposes of liability. With respect to this holding, therefore, we reverse.
>
> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period. [*Id.* at 113-114 (citations omitted).]

The Court concluded that while Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date he was hired until the date he was fired, only incidents that took place within the 300-day filing period were actionable. *Id.* at 114.

Thus, the Supreme Court reversed the Ninth Circuit's application of the continuing violations theory in the context of discrete discriminatory acts, and held that it should not be applied in such cases.[15]

2. Title VII claims based on hostile work environment may be analyzed under the continuing violations theory.

Despite the Supreme Court's decision to do away with the continuing violations theory in the context of discrete claims, and contrary to its previous statutory interpretation argument, the Court concluded that hostile work environment claims "are different in kind from discrete acts. Their very nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years

and, in direct contrast to discrete acts, a single harassment may not be actionable on its own. Such claims are based on the cumulative affect of individual acts" *Id.* at 115. The Court distinguished the fact that Title VII mentions specific employment decisions with immediate consequences, noting that the use of "the phrase terms, conditions, or privileges of employment [of 42 USC § 2000e-2(a)(1)] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Id.* at 116.

In determining whether an actionable hostile work environment claim exists, the Court affirmed that it looks all the circumstances, including the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Id.* at 117. The Court stated:

> To assess whether a court may, for the purposes of determining liability, review all such conduct, including those acts that occur outside the filing period, we again look to the statute. It provides that a charge must be filed within 180 or 300 days "after the alleged unlawful employment practice occurred." A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1). The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. [*Id.* at 117-118.]

The Court continued, commenting that the act did not need to be the last act as long as the employer has engaged in enough activity to make out an actionable hostile environment claim, because an unlawful employment practice has "occurred," even if it is still occurring. *Id.* at 118.

---

[15] The Court pointed out in a footnote that "we have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none

The Court noted that subsequent events could still be part of one hostile work environment claim and a charge could be filed at a later date and still encompass the whole. *Id.* The Court determined:

> It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct. The statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability. And the statute does not contain a requirement that the employee file a charge prior to 180 or 300 days "after" the single unlawful practice "occurred." Given, therefore, that the incidents comprising a hostile work environment are part of one unlawful employment practice, the employer may be liable for all acts that are part of this single claim. In order for the charge to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment. [*Id.* at 117-118.]

The Court opined that its conclusion regarding what incidents may be considered for purposes of liability was supported by the fact that the statute does not bar plaintiffs from recovering damages for that portion of the hostile work environment claim falling outside the limitations period, and that other specific provisions of Title VII allowed for the recovery of back pay up to two years before the filing of the charge. *Id.* at 119. The Court thought it unlikely that Congress intended to limit liability to damages within the time period if it allowed two years of back pay. *Id.* In addition, the Court believed it made little sense to limit the assessment of liability in a hostile work environment claim under Title VII to conduct that falls within the 180 or 300-day period, since that period will vary depending on whether there is a state agency charged with the authority to grant relief. Id. The Court concluded, "[s]imply put, § 2000e-5(e)(1) is a provision specifying when a charge is timely filed and only has the consequence of limiting liability because filing a timely charge is a prerequisite to having an actionable claim. A court's task is to

---

are at issue here." *Id.* at 115 n9.

determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any acts falls within the statutory time period." *Id.* at 120.

With respect to Morgan's claims, the Court determined that it could not say that the alleged acts were not part of the same actionable hostile environment claim, and affirmed the Ninth Circuit on this point. *Id.* at 121.

The Court closed its opinion by noting that its "holding does not leave employers defenseless against employees who bring hostile work environment claims that extend over long periods of time," because the time period requirement is subject to "waiver, estoppel, and equitable tolling 'when equity so requires.'" *Id.* (citation omitted.) The Court also suggested that an employer may raise a laches defense against a plaintiff. *Id.* With that, the Court restated its holdings that

> a Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within the appropriate time period . . . set forth in 42 USC § 2000e-5(e)(1). A charge alleging a hostile work environment claim, however, will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. Neither holding, however, precludes a court from applying equitable doctrines that may toll or limit the time period. [*Id.* at 122.]

D. *Amtrak v Morgan*: The dissent - Hostile work environment claims should be treated similarly to discrete discriminatory claims.

The Court's opinion was delivered by Justice Thomas, and was joined by Justices Stevens, Souter, Ginsburg and Breyer. Chief Justice Rehnquist, Justices O'Connor, Scalia, and Kennedy joined in the Court's opinion regarding discrete discriminatory acts, but dissented from the holding regarding hostile work environment claims. Justice O'Connor wrote the dissenting opinion.

Justice O'Connor agreed with the Court's decision that there was "no need to resolve fully the application of the discovery rule to claims based on discrete discriminatory acts." 536 US at 124.[16] However, in Justice O'Connor's view, "the charge-filing period precludes recovery based on discrete actions that occurred more than 180 or 300 days after the employee had, or should have had, notice of the discriminatory act." *Id.*[17]

Turning to the key issue, Justice O'Connor stated that she would hold that § 2000e-5(e)(1) serves as a limitations period for all actions brought under Title VII, including those alleging hostile work environment discrimination. *Id.* According to Justice O'Connor, that section draws no distinction between claims based on discrete acts and claims based on hostile work environment. *Id.* Thus, if a plaintiff fails to file a charge within that time period, liability may not be assessed, and damages must not be awarded, for that part of the claim falling outside the charge-filing time period. *Id.* While Justice O'Connor agreed with the Court's characterization of hostile work environment claims as "composing a single claim based on conduct potentially spanning several years," she disagreed with the Court's conclusion that a claim may be based, and recovery had, for all acts falling outside the time period if any part of the claim occurred within the charge filing period. *Id.* She stated:

> Although a hostile environment claim is, by its nature, a general atmosphere of discrimination not completely reducible to particular discriminatory acts, each day the worker is exposed to the hostile environment may still be treated as a separate "occurrence," and claims based on some of those occurrences forfeited. In other words, a hostile environment is a form of discrimination that occurs every day; some of those daily occurrences may be time barred, while others are not.
>
> The Court's treatment of hostile environment claims as constituting a single occurrence leads to results that contradict the policies behind 42 USC § 2000e-

---

[16] Justice O'Connor noted that the *Amtrak* case did not provide an occasion to determine whether the discovery rule operates in the context of hostile work environment claims. 536 US at 124, n*.

[17] Justices Scalia and Kennedy did not join this portion of the dissent, although Chief Justice Rhenquist and Justice Breyer did.

> 5(e)(1). Consider an employee who has been subjected to a hostile work environment for 10 years. Under the Court's approach, such an employee may, subject only to the uncertain restrictions of equity . . . sleep on his or her rights for a decade, bringing suit only in year 11 based in part on actions for which a charge could, and should, have been filed many years previously in accordance with the statutory mandate. § 2000e-5(e)(1) ("A charge under this section shall be filed [within 180 or 300 days] after the alleged unlawful employment practice occurred"). Allowing suits based on such remote actions raises all of the problems that statutes of limitations and other similar time limitations are designed to address . . . . [*Id.* At 124-125.]

Justice O'Connor discounted the Court's argument that limiting hostile work environment claims would conflict with Title VII's allowance of back pay liability for up to two years before the charge's filing, because such recovery would still be available based on equitable doctrines. *Id.* at 126. She also found unpersuasive the Court's distinction that it would not make sense to base relief in hostile work environment claims on the charge filing period since the period varies with whether a state has an agency processing such claims, because that is "precisely the principle the Court has adopted for discrete discriminatory acts . . . ." *Id.* Justice O'Connor determined that her approach is consistent with that taken by the Court in other contexts, such as ongoing anti-trust violations and racketeering actions, where the Court has prohibited the "bootstrapping" of untimely acts on the basis of independent, new predicate acts. *Id.* at 127. She concluded that "the Court today allows precisely this sort of bootstrapping in the Title VII context; plaintiffs may recover for exposure to a hostile environment whose time has long passed simply because the hostile environment claim has continued into the charge-filing period." *Id.* at 127-128.

E. ***Amtrak v Morgan:*** **A comment on the practical effect of the Supreme Court's bifurcated decision.**

The Supreme Court's decision has been both lauded, and criticized. See Topputo, In Opposition to Applying the Continuing Violation Doctrine to Hostile Work Environment Claims; *National Railroad Passenger Corp v Morgan,* 536 US 101 (2002), 28 U Dayton L Rev

449 (2003); Commentary, *Leading Cases: III. Federal Statutes and Regulations: B. Civil Rights Act*, 116 Harv L Rev 352 (2002); Cheng, *National Railroad Passenger Corp v Morgan:* A Problematic Formulation of the Continuing Violation Theory, 91 Calif L Rev 1417 (2003). Not surprisingly, one common criticism (although stemming from different philosophies) concerns the Court's distinction between discrete act claims and hostile work environment claims. While much criticism is directed at the Court's analysis, and whether such a distinction is tenable, one author has noted what the practical effect may be:

> Although the Court did limit the use of the continuing violations doctrine with discrete acts claims, the undesirable consequences just described [an increase in premature claims filed with the EEOC] will likely not result from that ruling (certainly not to the same degree). *The reason is that the majority's decision to let individuals invoke the continuing violations doctrine for hostile environment claims will simply lead employees to couch their claims in hostile environment terms.* [116 Harv L Rev, *supra* at 360 (emphasis added).]

These concerns weigh in favor of a simultaneous and uniform resolution of the question of whether the continuing violations doctrine should continue to apply to discrete acts claims and hostile work environment claims in Michigan, despite the fact that this Court is not presented with a hostile environment claim in this case.

F. Michigan's continuing violations doctrine should be abrogated or at the very least modified in light of *Amtrak v Morgan.*

This Court should follow the approach taken by the majority in *Amtrak*, *supra*, and strictly apply the language of MCL 600.5805(1) and (10) to bar claims of employment discrimination based on discrete acts that occur outside of the three-year period of limitations. Although not specifically presented with a hostile work environment claim in this case, this Court should take the opportunity to address the issue and follow the reasoning set forth by Justice O'Connor and hold that hostile work environment claims based on discriminatory acts occurring outside of the three-year period of limitations are barred.

Again, an action for employment retaliation or discrimination under the CRA must be brought within three years after the cause of action accrued. MCL 600.5805(10); See *Mair v Consumers Power Co*, 419 Mich 74, 77-78; 348 NW2d 256 (1984).

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, **after the claim first accrued to the plaintiff** or to someone through whom the plaintiff claims, **the action is commenced within the periods of time prescribed by this section.**
>
> * * *
>
> (10) The period of limitations is 3 years **after the time of . . . injury** for all other actions to recover damages for the death of a person, or for injury to a person or property. [MCL 600.5805 (emphasis added.)]

A "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827.

This Court has repeatedly recognized the importance of statutes of limitation. For example, in refusing to toll the statute of limitations in an employment discrimination case on the basis of the plaintiff's federal filing, the *Mair* Court stated:

> This Court has long recognized the value of a statute of limitations. In *Shadock v Alpine Plank-Road Co*, 79 Mich 7, 13; 44 NW 158 (1889), Justice Campbell said:
>
> "The whole reason for statutes of limitation is found in the danger of losing testimony, and of finding difficulty in getting at precise facts."
>
> In *Wells v the Detroit News, Inc*, 360 Mich 634, 639; 104 NW2d 767 (1960), we said that the "statute of limitations was designed to eliminate stale claims". And in *Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974), we said that "the statute of limitations is not a disfavored plea but a perfectly righteous defense, a meritorious defense". See, also, *Lothian v Detroit*, 414 Mich 160; 324 NW2d 9 (1982). For these reasons, it is the general rule that exceptions to statutes of limitation are to be strictly construed. See *Bock v Collier*, 175 Or 145; 151 P2d 732 (1944); *Woodruff v Shores*, 354 Mo 742; 190 SW2d 994 (1945); *Slade v Slade*, 81 NM 462; 468 P2d 627 (1970); *Lake v Lietch*, 550 P2d 935 (Okla, 1976). [*Mair, supra* at 80.]

More recently, in *Herweyer v Clark Hwy Services*, 455 Mich 14; 564 NW2d 857 (1997), a wrongful termination case brought pursuant to an employment contract, the Court held that when a contractual limitations period is unreasonably short, the Court will not fashion a period based

on the facts, but will look to the limitations period provided for by statute. In reaching its decision the *Herweyer* Court commented:

> A statutory period of limitation provides a defense that bars a plaintiff's cause of action because of an undue lapse of time since the cause of action arose. 51 Am Jur 2d, Limitation of Actions, § 2, p 592. There are several policy reasons underlying the adoption of statutes of limitation. They protect defendants' rights by eliminating stale claims, shielding defendants from protracted fear of litigation, and ensuring that they have a fair chance of defending themselves. *Chase v Sabin*, 445 Mich. 190, 199; 516 N.W.2d 60 (1994); *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974). Statutes of limitation are also constructed to give plaintiffs a reasonable opportunity to bring suit. *Chase, supra.*
>
> * * *
>
> Statutes of limitation embody the important public policy considerations of stimulating business activity, punishing negligence, and giving security and stability to human affairs in general. 51 Am Jur 2d, Limitation of Actions, § 18, p 603, citing *Kyle v Green Acres at Verona, Inc*, 44 NJ 100; 207 A2d 513 (1965).
>
> A statutory limitation period provides peace of mind to a potential defendant. A defendant can be certain that, once the period expires, extensive defense of a new lawsuit will be unnecessary. A plaintiff, also, is entitled to certainty in legal dealings. Allowing courts to fashion arbitrary periods of limitation depending on the facts of each case sometimes would force claimants to file suit prematurely, lending further instability to employment relations. In many cases, suit would have to be brought before adequate investigation had been completed.
>
> The public policy considerations underlying limitation periods are not advanced, either, by encouraging uncertain periods of limitation. We agree with the Court of Appeals dissent that the applicable statutory limitation period is a straightforward and objective indicator of what period is reasonable. *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982). In the case before us, defendant has not stated a convincing argument why we should abandon the objective indicator and authorize nonspecific contractual periods of limitation. [*Id.* at 19-23.]

Concomitant with this Court's respect for the value of statutes of limitation, is this Court's commitment to fundamental principles of statutory construction, as recently restated in *In re Certified Question*, 468 Mich 109, 113; 659 NW2d 597 (2003):

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward*, 460 Mich 230; 596 NW2d 119 (1999). When a legislature has unambiguously conveyed its

> intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

Similarly, in *Morales v Auto Owners Ins Co (After Remand)*, 469 Mich 487; 672 NW2d 849 (2003), in refusing to judicially "toll" or suspend judgment interest during appeal as outside the plain language of the judgment interest statute, this Court stated:

> If the Legislature's intent is clearly expressed, no further construction is permitted. *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000). Under such circumstances, a court is prohibited from imposing a "contrary judicial gloss" on the statute. *In re Certified Question*, 468 Mich 109, 113; 659 NW2d 597 (2003). . . .
> The statute makes no exception for periods of prejudgment appellate delay. In the face of the Legislature's clearly expressed intent, this Court will not read such an exception into the statute. [*Id.* at 490-492.]

This Court has refused to permit tolling of statutes of limitation in other contexts where it would conflict with the plain language of the statute. For example, in *Boyle v General Motors Corp*, 468 Mich 226; 661 NW2d 557 (2003), the Court refused to apply the "discovery rule," which is analogous to the continuing violations doctrine, to extend the statute of limitation applicable to fraud claims. See also, *Stephens v Dixon*, 449 Mich 531, 537; 536 NW2d 755 (1995) (Holding that the discovery rule is not available in a case of ordinary negligence); *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995) (Holding that discovery rule does not apply to intentional tort claims of assault and battery and intentional infliction of emotional distress based on sexual abuse that was discovered from repressed memories.) The Court of Appeals has followed this Court's lead by recently holding that it would not apply the continuing violations doctrine to toll the statute of limitation in a breach of contract claim. See *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241; 673 NW2d 805 (2003). Application of the continuing violations doctrine is antithetical to the Court's recognition of the value of statutes of limitation, and the Court's adherence to statutory construction principles.

Furthermore, the concerns that apparently lead the *Sumner* Court to adopt the doctrine are no longer, if they ever were, as compelling. Again, the continuing violations doctrine was instituted by the federal courts to remedy the short filing periods under Title VII:

> The doctrine is partly the product of Title VII's comparatively short filing deadline: whereas Title VII claims must be filed with the EEOC within 180 (or 300) days, individuals bringing a tort claim can usually wait two or three years, civil RICO claimants have four years to file, and some victims of malpractice have even longer. The short filing period has led some to conclude that Congress anticipated a continuing violations doctrine. Whether or not this is true, courts have used the doctrine to ameliorate the harsh effects of the unusually short filing period. [116 Harv L Rev, *supra* at 356-357.]

Michigan's three-year limitations period provides plaintiffs with ample time to recognize and file a complaint. For instance, in *Sharpe v Cureton*, 319 F3d 259 (CA 6, 2003), the United States Court of Appeals for the Sixth Circuit applied the holding in *Amtrak*, *supra*, to bar the plaintiff firefighters' retaliation claims under 42 USC § 1983. The statute of limitations applicable in *Sharpe* was a one-year period imposed by Tennessee law. *Id.* at 268. The *Sharpe* Court observed that the "continuing violations doctrine arose in the context of the 'obviously quite short deadlines set forth in Title VII, and the relatively longer limitations periods provided by states for § 1983 actions reinforces as a policy matter *Morgan's* applicability to these claims." *Id.* Moreover, the need for specific, strictly enforced statutes of limitation is aptly demonstrated by the facts in this case. Here, Plaintiff filed her suit on July 21, 1995. Accordingly, reliance on acts occurring before July 21, 1992, were time-barred under MCL 600.5805. Plaintiff, however, based her retaliation claims on, and sought to recover for, denials of over twelve promotions between 1983 and 1992. (Appellant's Brief on Appeal, pp 18-19.) Plaintiff's alleged instances of opposition activity took place in 1981 (the silent slugging), and 1987 (grievance regarding national origin discrimination.) Allowing Plaintiff to assert these undisputedly stale claims is simply contrary to the plain language and purpose of MCL 600.5805. Furthermore, in the

twenty years since *Sumner* adopted the continuing violations doctrine, employees have become more knowledgeable and aware of their rights, and most larger employers have instituted policies and procedures for addressing discrimination or harassment.[18] Notably, in this case, it appears that Plaintiff was aware of her rights in 1987, almost five years before she filed suit, when she filed a grievance alleging national origin discrimination. Amicus curiae submits that the timing and facts of this case present an important opportunity for this Court to abrogate the continuing violations doctrine as adopted by the Court in *Sumner*, *supra*, with regard to claims based on discrete acts of discrimination. Additionally, because the same legal arguments may be applied to hostile work environment claims, and because of the potential practical effect a bifurcated decision may have on the characterization of future suits, this Court should follow Justice O'Connor's rationale and hold that the doctrine is inapplicable to hostile work environment claims as well.

[18] Indeed, employers are encouraged to adopt policies and procedures as a defense mechanism. See *Chambers, supra,* 463 Mich 297.

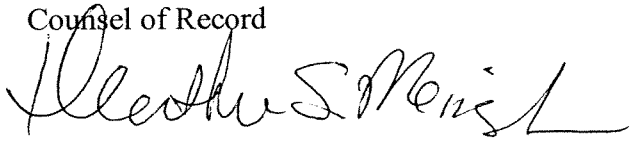
CONCLUSION AND RELIEF SOUGHT

This Court should hold that physical retaliation by a nonvictim plaintiff cannot be considered protected activity for purposes of establishing a prima facie case of retaliation under the Civil Rights Act, MCL 37.2701. In addition, this Court should abrogate use of the continuing violations doctrine, as adopted in *Sumner v Goodyear Tire & Rubber Co*, to extend the statute of limitations in employment discrimination claims based on discrete acts as well as claims based on a hostile work environment. Such a decision is supported by the United States Supreme Court's decision in *Nat'l Rail Passenger Corp v Morgan*, and is consistent with Michigan law emphasizing the importance of statutes of limitation and principles of statutory construction.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record



Patrick J. O'Brien (P27306)
Heather S. Meingast (P55439)
Assistant Attorneys General
P.O. Box 30637
Lansing, MI 48909
(517) 373-6434

Dated: June 16, 2004
2004008492A/amicus brief

STATE OF MICHIGAN
IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee/Cross-Appellant,

v

MACOMB COUNTY COMMUNITY MENTAL HEALTH,

Defendant-Appellant/Cross-Appellee,

And

LIFE CONSULTATION CENTER,

Defendant.

_____/

Supreme Court No. 121361

Court of Appeals No. 223829

Macomb County Circuit Court
No. 95-3319-CK

NOTICE OF HEARING

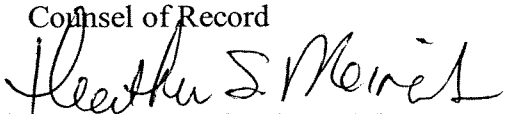
TO: Counsel of Record

PLEASE TAKE NOTICE that the Motion for Leave to File Amicus Curiae brief will be brought on for hearing on Tuesday, **July 27, 2004**, before the Michigan Supreme Court.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record



Patrick J. O'Brien (P27306)
Heather S. Meingast (P55439)
Assistant Attorneys General
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434

Dated: July 16, 2004

STATE OF MICHIGAN
IN THE SUPREME COURT

SHARDA GARG,

Plaintiff-Appellee/Cross-Appellant,

v

MACOMB COUNTY COMMUNITY MENTAL HEALTH,

Defendant-Appellant/Cross-Appellee,

And

LIFE CONSULTATION CENTER,

Defendant.

/

Supreme Court No. 121361

Court of Appeals No. 223829

Macomb County Circuit Court
No. 95-3319-CK

PROOF OF SERVICE

On the date below, I sent by first class mail a copy of Amicus Curiae Brief of Michigan Attorney General to the following:

Monica F. Linkner
SOMMERS, SCHWARTZ, SILVER
& SCHWARTZ, P.C.
2000 Town Center, Suite 900
Southfield, MI 48075-1100

Susan Healy Zitterman
Karen B. Berkery
KITCH DRUTCHAS WAGNER
DENARDIS & VALITUTTI
One Woodard Avenue, 10th Floor
Detroit, MI 48226

I declare that the statements above are true to the best of my information, knowledge, and belief.

Date: July 16, 2004

Rhonda Robison

Rhonda Robison